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IN THE

Supreme Court of the United States

October Term, 1959

No. 662

ROBERT CUSHMAN, MURPHY, MARJORIE SPOCK, MARY T. RICHARDS, JOHN C. HOMER, GLADYS WEEKES, DAVID KENNEDY, FRANCES P. BERENS, MARY JACOBS, ARCHIBALD B. ROOSEVELT, CHARLES BANKS BELT, FRANK C. REUSCHLE, ELSA REUSCHLE and JANE N. NICHOLS,

Petitioners,

—vs.—

EZRA TAFT BENSON, Secretary of Agriculture of the United States,

Defendant,

and

LLOYD BUEHLER, Area Supervisor, Plant and Pest Control Division of the United States Department of Agriculture, and DANIEL CAREY, Commissioner of Agriculture and Markets of the State of New York,

Respondents.

BRIEF OF PETITIONERS IN REPLY TO BRIEF OF COMMISSIONER OF AGRICULTURE AND MARKETS OF THE STATE OF NEW YORK

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Though the petitioners filed a brief in opposition to the motion to *substitute* the successor-in-office of the respondent Daniel Carey as party respondent herein, and though we have not been notified that the motion has been granted despite our opposition, we note that the successor-in-office, Don J. Wickham, is named in the caption to the Brief in Opposition to Petition for Certiorari as though the motion for substitution had been granted, and an order entered.

As we pointed out, the successor-in-office has not caused *incidental damages* to the petitioners, nor does he *threaten* any wrong to petitioners.

At page 5 of the Brief in Opposition it is stated, correctly, that "Agriculture and Markets (deals) with domestic animals and planted crops" which would seem to *exclude* the gypsy moth and other forest insects whose control is expressly entrusted to the Department of *Conservation* by the New York statute (Petition, App. "A", pp. 2a to 5a).

Respondent is quite mistaken in stating, on page 4, that the gypsy moth

> "attacks • • • not only forests • • • but *orchards* as well."

That was the single change that the trial judge made in the findings of fact submitted by the defendants (R. 332a).

But even if the control of the gypsy moth *had* been entrusted to *both* departments, as argued, no statute has empowered the Commissioner of Agriculture and Markets to grant the authorization to the Secretary of Agriculture to carry out operations in the State of New York against the gypsy moth or to co-operate with him, as required by the federal statute (Petition, App. "A", pp. 1a and 2a).

Even when dealing with a pest expressly committed to his control (e.g. the golden nematode, a "plant disease") the New York Attorney General properly ruled that "specific statutory authority" was a prerequisite to a co-operative arrangement with the federal Secretary of Agriculture; and an enabling statute was accordingly enacted (Petition, App. "A", pp. 7a and 8a). Respondent entirely ignores that feature, and ignores the fact that the Connecticut agricultural authorities similarly ruled with respect to granting the Secretary of Agriculture authority to take measures in that state against the gypsy moth (R. 63a).

This is not a mere "question of *local* concern", because the Federal Department of Agriculture must get its authority from some official or body of the State of New York who is empowered by New York statute to grant such authority.

If, for the foregoing, or any other reason the respondent Carey, in co-operating with the federal officer, was exceeding his official authority, his liability is *personal* (fortunately, in this case, indemnified by the contractor and its liability insurance carrier (R. 227b, 926, 932, 928, 113a).

Respectfully submitted,

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